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# **Review of the EU Constitutional Treaty: challenges for Poland**

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## ■ INTRODUCTION

This review is written to fulfill two tasks. Firstly, it is the first Polish comprehensive analysis of the Draft Constitutional Treaty prepared by the European Convention. A comprehensive view of the Treaty is extremely important because only in that perspective one can see the merits and demerits of the project. Secondly, in this review – after a careful analysis of the content of the Treaty – the authors have attempted to identify and justify the most important new proposals, especially from the Polish perspective. The Treaty from the viewpoint of an acceding country is very controversial. One of the most important problematic issues presented in the Draft is the altering of the Nice Treaty (this matter will be discussed in depth further down).

The first part of the review shows the political context of the Draft Constitutional Treaty. It is followed by a systematic analysis of the most important chapters of the Constitution – the functioning of the Union, institutional changes, all the way to the reforms of the pillar structure. At the end, the authors provide a catalogue of proposals amending the current document, putting a stress on those which will be of great importance during the Intergovernmental Conference.

## 1. THE NICE COMPROMISE, THE AGENDA OF THE CONVENTION AND THE STRUCTURE OF THE CONSTITUTIONAL TREATY

Fifty years after creation, the European Union has reached a level of „critical mass” (understood in a positive sense) – it has created a Single Market, established EMU, introduced the Euro and „levelled up” political integration. On the other hand, the Union suffers a deep structural crisis and lacks political identity, which makes profound reforms indispensable. The third aspect is the expansion of the Union on an unprecedented scale – no previous expansion has involved nearly doubling the number of member-states, never have the gaps of wealth between them been as profound.

In response to that, current EU members were faced with two vital problems:

- 1) How to maintain the pace of integration?
- 2) How to restrain the weakest countries from dominating the integration process?

One could easily see that answers to these issues were sought during the IGC 2000 and, subsequently, in the activities of the Convention. They have not yet been found and that is precisely what makes the IGC 2003/2004 exceedingly difficult.

The candidate countries, among them Poland, also have several problems: as countries which for many years will be in a weaker position in the Union, they seek a Union that is effective and strong. On the

other hand, they are particularly concerned about EU decision-making procedures. This is based on their lack of experience on the single market. Last but not least, the acceding countries work under pressure exerted by their societies, which are very sensitive to the problem of sovereignty.

During IGC 2000, EU member-states decided to finalize the process of enlargement as quickly as possible, thus limiting the duration of the Nice institutional compromise to the point where the Union reaches 27 members. The candidate countries perceived the compromise very positively – it both ended the period of EU's „institutional transition” and made it possible for these countries to take active part in the Union's mainstream changes.

Voices calling for an amendment of the Nice compromise started being heard right after the end of the summit. During the works of the Convention, the proponents of these alterations succeeded, re-opened the Nice compromise and changed the voting system. At the same time, the planned IGC was moved ahead to the time before enlargement and scheduled to last for a very short period (October-December 2003). It was essential for the acceding countries to obtain an equal footing during the IGC, which they had been granted on the base of the Copenhagen and Thessalonica Summits.

The Laeken Declaration of December 2001 underlined four major tasks for the Convention: simplification of the existing Treaties, clear delimitation of powers between the EU and the Member States based on the principle of subsidiarity, the status of the Charter of Fundamental Rights and the role of national parliaments in the European structure. After 16 months of work,

the Convention concluded by submitting the Draft Constitutional Treaty of the European Union.

The Constitutional Treaty is divided into four main parts.

The first part is split into 9 Titles:

- I** Definition and Objectives of the Union,
- II** Fundamental Rights and Citizenship of the Union,
- III** Union Competences,
- IV** The Union Institutions,
- V** Exercise of Union Competence,
- VI** The Democratic Life of the Union,
- VII** The Union Finances,
- VIII** The Union and its Immediate Environment,
- IX** Union Membership;

The second part is the Charter of Fundamental Rights (approved with slight changes).

The third part (The Policies and Functioning of the Union) is split into 7 Titles of varying size:

- I** Clauses of General Application,
- II** Non-discrimination and Citizenship,
- III** Internal Policies and Action (a very vast title, which in five chapters groups

the law associated with the functioning of the Single Market),

- IV** Association of the Overseas Countries and Territories,
- V** The Union's External Action (combining in 8 chapters the CFSP, CSDP, Common Commercial Policy, Cooperation with Third Countries and Humanitarian Aid, Restrictive Measures, International Agreements, Union's Relations with International Organizations and Third Countries, and Union Delegations and Implementation of Solidarity Clause),
- VI** Functioning of the Union (split into 3 chapters: I Provisions Governing the Institutions, II Financial Provisions and III Enhanced Cooperation);
- VII** Common Provisions;

and the fourth part (General and Final Provisions).

Additionally, the Draft is supplemented by 4 protocols and 3 declarations. The protocols are as follows: On the Role of National Parliaments in the European Union, On the Application of the Principles of Subsidiarity and Proportionality, On Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers, and On the Euro Group and Amending the Euratom Treaty.

The declarations are dealing with: the Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers, On the Creation

of a European External Action Service and, in the Final Act, on Signing the Treaty Establishing the Constitution.

## 2. The Bases of the European Union – what is the European Union meant to be?

The current structure of the European Union is very complicated. The Union is based on three pillars: the first – a federal one, is the home of the two Communities – the European Community and Euratom; the second pillar is the Common Foreign and Security Policy; the third – Police and Judicial Cooperation in Criminal Matters. The second and third pillars have an inter-governmental character, that is – governments cooperate in these fields on the basis of international law (the Treaty of the European Union).

One could easily predict that Member States would decide to transform the European Union into an international organization and give it legal personality. This was a *sine qua non* for the process of simplification of the EU structure. The discussion on this subject started during the 1996/97 IGC. The two solutions taken into account were: leaving three organizations – the EU, European Community and Euratom (the two latter combined with the EU), or creating one organization – European Union (and eliminating Euratom and the European Community).

Without doubt, the second solution is simpler and clearer. It presumes, of course, the existence of different legal regimes according to the current pillar structure. Choosing the first option would create several problems and surely would not make the EU any simpler.

One of the most important results of the work done by the Convention is the proposal to transform the Union into an interna-

tional organization, which is clearly stated in Part I, Art. 6. However, the proposed transformation system is not fully consistent. According thereto, the new European Union is to take over all three pillars of the existing EU and the European Community but, for an unknown reason, leave out Euratom.

Speaking of the structure of the Draft Constitutional Treaty, one can see that it is not very clear. Apart from leaving out Euratom, the European Convention has left aside a heavily discussed decision to divide the Constitution into two separate blocks – the first one grouping basic provisions, the second – operative provisions (the blocks were to be differentiated by the revision clause). The consequence is a Treaty without a clear definition of the demarcation of separate parts, which results in placing institutional laws in the first and third parts, several repetitions in the „introductory” or „general” parts, and so on. Apart from that, one can see no logical explanation for the proposed structure – for instance, the solidarity clause is both regulated by articles in the first as well as in the third part. This creates ambiguity and has no substantive explanation. It seems that the Draft Project will need to undergo profound structural changes during the Intergovernmental Conference.

Weaknesses of the Draft result from drawbacks in the Convention formula. In addition to differing attitudes present in the Convention (it represented a wide scope of institutions and political organizations, and inspired profound discussions within societies), it had several demerits as well. The main one was the fact that the work of the Convention proceeded in a somewhat parallel system – on one level

there were tense debates during sessions backed by public discussions in the home countries, on a totally different level there was the work performed by the Presidium, which handed out projects. To be totally honest, these projects quite often did not reflect the main themes of the debate. It is hard to believe, but during the last session of the Convention in July 2003, after handing in the project on the Thessalonica Summit, the Presidium opened a discussion about the „fundamental” problem of changing the number of areas ruled under the QMV regime (!), not to mention the fact that the discussion about the third part of the Constitution started only in the very last days of the activities of the Convention.

There was no clear definition of the mandate of the Convention members (formally, each member stood in his own name). That did not help the cause of finding a good compromise. Consequently, one can ask questions such as: Who is the author of the Draft Treaty? What is its formal status? The response that the declaration of the European Council is a good starting point for the IGC only partially answers these questions, especially when it is obvious that the uncertainty in the Convention's decision-making process hurts particularly the interests of the candidate countries. Frankly speaking, the Draft is a document prone to create tension.

From the legal point of view, the Constitutional Treaty is a successive revision treaty (international agreement) implemented according to Art. 48 TEU and ratified by member states in accordance with their constitutional procedures. Article IV-7 of the Constitutional Treaty widens the procedural scope by nominating a Convention tasked with preparing the document. The

Constitutional Treaty is, therefore, an international agreement signed by sovereign countries. The title „Constitution for Europe” has only a symbolic meaning and does not mean transforming the European Union into a quasi-state – the Union will remain as an international organization. The Treaty introduces the right of the Member States to leave the Union, and although this is obvious from the perspective of international law we should still support its inclusion in the Constitution.

The creation of the European Union as a legal entity is combined with the creation of a catalogue of values on which the Union bases its construction and which constitute its ideological manifesto. The Draft Treaty is underlining and expanding the axiology of the Union. One can read in the Preamble that Europe is a continent which has brought forth a civilization embedded in such values as equality of people, freedom and respect for reason. The set of values is rewritten in the Preamble of the Charter of Fundamental Rights.





### 3. EUROPEAN UNION OPERATING PRINCIPLES

In the present legal framework of the Union there is no set of rules to govern relations between the Union and the Member States. Certain such rules are mentioned in Art. 5 of the first part of the Draft Treaty.

One of the most important changes is that the Union cannot obtain competences which have not been bestowed thereon by the Member States. As a result of the rule of subsidiarity, the role of national parliaments is going to gain importance. Parliaments will obtain information about proposed bills simultaneously with the legislator, and be privy to legal amendments and legislative proposals of the European Parliament.

A new proposal to appear is the primacy of the Union law (Art. I-10). In the current political science doctrine, this principle has been somewhat obscured and this rule is bound to clarify the ambiguities.

The Draft Treaty divides Union competences into exclusive, shared, coordinative, supportive and supplementary (Art. I-11). Additionally, the Draft Treaty establishes

a flexibility clause (Art. I-17), which can serve as a base for separating supportive competences from others (analogically to current Art. 308 TEC).

The Common Foreign and Security Policy is alienated from the aforementioned competences and constrained in a separate provision (Art I-15). The division criteria are rather vague and are not an improvement on current treaties.

It is not clear which bodies of the Union are referred to as its institutions.

Art I-18 par. 2 lists the European Parliament, European Council, Council of Ministers, European Commission and the Court of Justice. However, Title II of Part 1, called „European Institutions”, adds the European Central Bank, Court of Auditors and other advisory organs to the list. Are then the European Central Bank and the Court of Auditors institutions of the Union or are they not? To confuse the reader even further, the fragment about institutions in Part 3 of the Treaty mentions the Court of Auditors but does not say a word about the European Central Bank.





## 4. INSTITUTIONAL CHANGES

As we have already said, the Draft Treaty does not provide a clear catalogue of Union institutions. Consequently, we have decided to discuss all organs of the Union mentioned in different parts of the Draft Treaty as institutions.

### European Parliament

All in all, the Treaty rewrites the main competences of the European Parliament – law-making (in cooperation with the Council of Ministers), budgetary collaboration, political control and consultative functions. An important amendment is the right given to the Council of Ministers to establish a different composition of seats in the Parliament, thus implementing the digressive proportionality principle (minimum 4 seats per Member State).

### European Council

The Treaty does not change the functioning of that institution but introduces several minor changes to the composition of the Council. The Treaty underlines the participation of the EU Foreign Minister in its activities but does not state the exact forms of that participation. When needed, Ministers of the Council may decide to be accompanied by one national minister (the President of the Commission would be accompanied by one of the Commissioners). The European Council will meet quarterly. Meetings will be announced by the President of the Council. Decisions will be adopted by consensus.

A novelty is the post of the President of the Council. The president will be elected by the Council itself for a maximum of two 2.5-year terms.

### Council of Ministers

The Council of Ministers will be a law-making institution jointly with the European Parliament. In addition, it will perform important budgetary functions. It will formulate Union policies and coordinate its statutory tasks.

The Council is composed of two formations: the Legislative and General Affairs Council. The General Affairs Council is meant as a link to the Commission and is tasked with preparing meetings of the Council of Ministers. The Treaty appoints the Foreign Affairs Council, which is to flesh out the Union's external policies on the basis of strategic guidelines laid down by the European Council. Other formations of the Council of Ministers will be established by the European Council.

The Treaty changes the formula of Qualified Majority Voting. The new formula is based on two principles – majority of states and majority of population (sixty percent, to be precise). The proposal is slated for implementation as of 2009. It eliminates weighted votes as one of the elements of the voting procedure.

The list of areas where QMV will be implemented has been expanded. This issue has been a problem for some time already – some countries want to leave unanimity voting with respect to certain specific areas, whereas others push for QMV standards.



The biggest problem of the acceding countries is their inexperience and, consequently, absence of identified national interests in those specific areas.

## European Commission

The Draft does not change the functioning of the Commission – the guardian of the Treaties. It confirms the principle of legislative initiative of that body. As of 2009, the Commission will be composed of the President, Minister of Foreign Affairs and 13 European Commissioners (elected on the bases of rotation). Additionally, the President may nominate (regular) Commissioners, who will come from states other than those already represented in the Commission. The difference between these two types of Commissioners is that the latter will have no right of vote at the sessions.

## Court of Justice

According to the Draft Treaty, the court system will be composed of the European Court of Justice, High Court and specialized courts.

## Other Institutions (European Central Bank, Court of Auditors, European Investment Bank and others)

The Treaty does not modify the competences of the European Central Bank. The only changes concerning the Court of Auditors result from the expansion of the Union and were included in the Nice Treaty. There are no major changes with respect to other bodies of the Union.

## 5. SOURCES AND CREATION OF LAW

The Draft totally modifies the catalogue of legal acts of the Union. Nevertheless, the new laws resemble their predecessors. The most important modification is that the Draft Treaty introduces hierarchical order of legal acts (different from the order of legal acts used at the national level). The acts can be divided into two groups: legislative acts (acts established on the basis of competences written into the treaties) and acts established on the basis of delegated legislature.

The Common Foreign and Security Policy has a different set of legal acts and the Treaty proposes their new catalogue. Title V (Exercise of the Union Competence),

**Chapter I** (Common Provisions), does not mention the instruments of the CFSP;

**Chapter II** (Specific Provisions) concentrates on competences of different institutions and only incidentally mentions that the European Council and the Council of Ministers conduct „European decisions” in this area. Frankly, this is a very hazy way of introducing a set of regulations for a specific policy.

Article 195 in Part III provides a catalogue of CFSP instruments. They are:

- general guidelines;
- decisions on actions of the Union;
- decisions on positions of the Union; and

- decisions on implementation of actions and positions.

Additionally, the Draft lists other decisions included in articles spread all over Part III of the Draft. They are:

- decision on strategic interests and objectives of the Union (Art. 194),
- decisions on the Common Security and Defence Policy (Art. 210 and others),
- decisions on the solidarity clause (Art. 231), and
- decisions on strengthen cooperation in the field of CFSP

The proposed set of CFSP acts is totally ambiguous and very complicated, which is in opposition to the Laeken Declaration. The elimination of the pillar structure has created a legal mess in the CFSP and does nothing to help understanding the configuration of that policy.

The Constitutional Treaty abolishes the pillar structure thus changing the structure of the Area of Freedom, Security and Justice (former third pillar). The set of legal acts to be implemented in this area is identical to the set of acts of other policies, notwithstanding some exceptions (Art. I-41, Art III-165).

The Treaty implements vital changes in law-making procedures. The general rule is to simplify these procedures. A novelty is the creation of an ordinary legislative procedure (Art. III-302).

## 6. SUBSTANTIVE LAW AND POLICIES OF THE EUROPEAN UNION

The most important part of the EU substantive law is the Single Market. The authors of the Draft Treaty did not present any concept of the Single Market. Art. 9 of Part I defines that the Union guarantees a free flow of people, goods, services and capital, but Art. 14 of Part III limits the market definition to its economic description. On the whole, the concept is copied from TEC with minimal changes.

The Treaty regulates several policies of the Union and gives them a different status. In addition to the Common Economic and Monetary Policy, there are three other common policies:

- Agriculture and Fishery Policy;
- Transport Policy
- Commercial Policy

and two ordinary policies: social and environmental.

The most important change in the Economic and Monetary Policy is the creation of the Eurogroup and modification of the law on international relations between the EU and third countries in the field of monetary policy. From the perspective of countries not participating in the euro, this modification is not a positive one. It would be better if non-euro country representatives could participate in Eurogroup meetings.

Apart from the amendments already mentioned, the Common Foreign and Security Policy has been modified in several



areas in order to accommodate changes that have occurred after the September 11 tragedy and the political crisis resulting from the Iraqi intervention. For instance, the list of Petersberg Missions has been expanded. Furthermore, the Treaty partly changes the concepts of structured cooperation (Art. I-40), mutual defence (Art. I-40) and solidarity clause (Art. I-42 and III-231), and establishes an European Armaments, Research and Military Capabilities Agency (Art. I-40).

Speaking of the changes in the former third pillar, one of the most controversial is the establishment of the European Prosecutor. The Prosecutor would be responsible for investigating, prosecuting and bringing to judgment the perpetrators of and accomplices in serious crimes affecting more than one Member State.

## **7. EVALUATION AND RECOMMENDATIONS**

### **1. Character of the Constitutional Treaty and its structure**

#### **Evaluation:**

The Constitutional Treaty establishes several important EU reforms. Since these reforms do not finalize the process of integration, the Treaty will be an important step in that process, but only one in many successive steps and by no means the final one. The Constitutional Treaty will be an international agreement signed by the Member States. They are the ones to decide whether it should be implemented. The title „Constitution for Europe” has a symbolic meaning which does not refer to transforming the Union into a quasi-state. The new Union will be an international organization based on an international treaty. The Draft Treaty introduces the right to leave the Union (Art. I-59), which should be seen as a desirable step forward. The Treaty needs several adjustments – both technical (the draft is not cohesive, has numerous repetitions, there is no defined division between its first, third and fourth part) and legislative.

#### **Recommendations:**

The public debate on the significance of the Treaty taking place in Poland should be „de-dogmatized” – the Treaty introduces some essential modifications in the functioning of the EU but it is just one step forward in European integration and should not be seen as the final one.

It is worth informing the public that the Treaty is an international agreement and that it defines the Union as an international organization.

One has to look carefully at structural and technical modifications of the Treaty – quite often these modifications reiterate important political and economic problems.

## 2. The regime of the European Union

### Evaluation:

The most important modification is the transformation of the Union into a unified international organization (giving it a legal personality). This move should be supported because unification is the *sine qua non* for the creation of a simple structure of the EU and simplification of its decision-making procedures.

There is one exception to the rule of unification of the EU – Euratom. The fact that it has been left aside shows that the Draft has stopped short from tackling a full EU reform. The Union will remain a limping organization with some awkward inter-institutional relations in place for no logical reason.

The unification of the EU structure (elimination of pillars) is only a partial success. The third pillar was abolished altogether while parts of the second pillar remained. These restructuring proposals are very controversial and should be discussed in depth during the IGC. Numerous technical objections notwithstanding, the main problem lies in the proposed total de-fragmenting of the CFSP, which pushes into an undefined future the perspective of the creation of a common European identity.

The Draft Treaty establishes a catalogue of European Union values. They are formulated in such general way that their interpretation remains an open question. This adaptable approach is very useful. However, the opposition to inserting in the Preamble a reference to the Judeo-Christian tradition as an element of European heritage is vexing. If the Treaty is to serve as a Constitution for Europe, vital elements of European identity ought to be stated in the document. Then again, one must not forget that the Treaty includes a modern set of regulations for interaction between Churches and the European Union.

The Draft description of the construction of the Union is very helpful from the Polish point of view. Most proposed amendments are not new ideas but their wording and significance have been made more specific. As for Poland, we must regretfully acknowledge that our country has not created any mechanisms for effectively benefiting from the strengthened role of national parliaments or the rule of participatory democracy, both proposed in the Draft Treaty. We must support the concept of clarifying the division of competences between the Union and the Member States.

Poland should approve the Single Market proposals (with some small reservations). The scheme of formalizing the Eurogroup should then be opposed as something unneeded. Proposals for Working Groups that would transform relations between the euro-zone and the rest of the world are awkward and should be eliminated.

### Recommendations:

While approving of the EU unification ideal, we should know the reasons why one



of its organizations (Euratom) has not been dealt with.

Poland should support the clarified constitutional rules of the EU: the catalogue of values, division of competences and sources of law (with some reservations). The postulate to insert a reference to Europe's Judeo-Christian tradition in the Treaty is a matter of principle; however, we should remember that an article of the Draft already covers the issue of relations between Churches and the EU.

### **3. Selected institutional problems – composition of the Commission, management of European Council and Council of Ministers activities, the EU Foreign Minister**

#### **Evaluation:**

In the sphere of institutional changes the Treaty does not implement anything significant. The idea of a radical reduction of the number of Commissioners, management of European Council activities and certain aspects of creating a post of EU Foreign Minister leave some questions. Certain Convention proposals are highly controversial and have been added to the Draft as a result of political momentum. An in-depth debate of these issues should be organized and the Polish proposal to of a „group presidency” could be a good starting point toward a compromise.

Proposals concerning the composition of the Commission need an insightful analysis. A radical reduction of the number of

Commissioners is not in the Polish interest. We should maintain the present number of Commissioners and should vote against the appointment of non-voting Commissioners because that will blur the decision-making process. A higher number of Commissioners will enable Poland to be represented in the Commission more frequently and fully.

The appointment of an EU Foreign Minister is all in all acceptable, but we should insist on a clear definition of the length of his/her term in office (logically, it should be the same as a Commissioner's) and on clear rules of the rotation sequence (successive ministers selected by nationality or geographical region). The argument that practice will create the rules is very delusive – in practice, it will be very difficult to dislodge a „lingering” minister put in the position by one of the big states.

The proposed system of managing Council of Ministers activities is a very complicated compromise between big and small Member States; in this proposal, the Treaty favours the big states by handing them the two main jobs – European Council President and EU Foreign Minister. Poland would benefit from a more balanced solution.

The idea of reducing the number of formations in the Council of Ministers should be reconsidered – the Draft gives only illusory specifications in this matter. The establishment of the Legislative Council is rightfully criticized – every formation should be involved in legislation (to the extent of its mandate, of course). The present practice of the European Council establishing formations of the Council of Ministers (of which there are currently nine) should be promoted, on the condition that



the number of formations is reasonable and appropriate to the needs. This solution will secure the needed flexibility and – what is extremely important for the acceding countries – ensure involvement of the required number of high-ranking functionaries in European Union activities.

### Recommendations:

Poland should without any doubt opt for a unified composition of the Commission and oppose the idea of non-voting Commissioners. At the present stage, the concept „one country – one commissioner” should be preserved (until the EU has 27 members as stated in the Nice Treaty – even then in no event less than 20 Commissioners).

The rule of equal rotation and the rule that each new Member State should have its own Commissioner as soon as it joins the EU should be written into the project as well. If this happened, the post of the Minister of Foreign Affairs would be an important concession for the big states

The formula of „group presidency”, which is a good compromise, could be based on the following rules:

- The Foreign Minister would keep the seat of Foreign Affairs Council Chairman (concession to the big states);
- The presidency of other Council of Ministers formations would be handed to groups of countries for a term of at least one year – each country would chair the formation that best fits its specialization;
- We could put forward the concept of a rotating presidency of the European Council

(the Convention's proposal to establish a permanent presidential post is not very popular and the suggestion to have someone „not from the club” governing the heads of European states is outright absurd).

- The group of presiding countries would be elected by the European Council, which would also decide which country would head which formation, and which would preside over the European Council itself.
- Assuming that the number of formations would be between 6 and 8, each Member State would participate in group presidency every 4 or 5 years.

The proposal to establish a post of EU Foreign Minister is worth supporting because it will give a solid worldwide identity to the Union. However, the minister's term in office and the rotation sequence must be clearly defined.

Poland should be flexible about the number of Commissioners and oppose the limitation of the legislative role of the European Council to just one Council of Ministers formation.

## 4. Qualified Majority Voting

### Evaluation:

The political discourse in Poland is focusing solely on re-opening the „Nice package” in the Draft Treaty. However, we must understand that the problem of the number of weighted votes is strictly linked to other important issues – allocation of seats in

other institutions (mainly the European Parliament and the European Commission) and, especially, selecting policy areas where QMV would be implemented. The Convention wrote its proposals without giving consideration to a wider perspective and only for the purpose of amending the Nice Treaty before the enlargement. In some cases, decision-making procedures were alarmingly amateurish, as for example the proposal to discuss certain areas as „technical amendments” after the Draft Treaty is deposited in Thessalonica! Therefore, these problems need to be re-discussed during the IGC.

At the present stage, the elimination of weighted votes as an element of QMV decision-making process is disadvantageous to small, mid-size and weaker EU Member States (weighted votes make it easier to build veto minorities able to block resolutions). From the Polish perspective, this has a double negative impact – the Nice Treaty gave Poland a privileged position, which will be severely weakened by the demographic factor in the QMV system proposed by the Convention: weighted votes are an element of a system of communicating vessels which includes the allocation of seats in the European Parliament (a body that co-decides in areas falling under the QMV regime) and the formula of the composition of the European Commission (big states have lost a second commissioner due to the enlargement so they aim at being compensated in the decision-making process). The status of Poland in the decision-making process is therefore not only limited by the number of votes but also by the composition of the Commission and the allocation of seats in the Parliament.

The possibility of gaining a form of compensation in the new allocation of seats in

the European Parliament is possible, but for Poland it will be a sensitive matter because the new system harms small states to a much greater extent than Poland. They will also want compensation, which will lead to a clash of interests mainly among the acceding countries.

Consideration should be given to supporting the community method by widening the scope of implementation of the „passarelle method” (as proposed by the Convention – see Part II, Art. I-24, Sec. 4). As compensation for our agreement to keep the present voting system, we could promote the use of the path method in shifting policy areas from the unanimity regime to the QMV regime. This solution would be flexible by virtue of it supporting an evolutionary approach to strengthening the community method, making it possible for new Member States to gain experience of the European market and, most importantly, guaranteeing the dynamics of EU integration.

### **Recommendations:**

Maintaining the QMV decision-making procedure decided in Nice is in Poland's current political interest. We can assume that a certain number of countries will support our postulates and, consequently, we should expect a great deal of pressure from the big countries. Indeed, large Member States are aware that, after the enlargement by mainly small and mid-size countries, forcing through a change from which large states will benefit so much will be almost impossible.

There are several areas where Poland will need to negotiate to maintain its present strong status in the EU decision-making

process: the problem does not end with the number of votes but also covers the formula for the composition of the Commission and allocation of seats in the European Parliament, and extends in particular to the possibility of shifting certain policies to the QMV regime. All these factors have to be taken into account during the IGC.

The most important problem (where national interests are directly affected) is the issue of shifting policy areas from the unanimity procedure to QMV. Poland has to be very careful in this matter, especially when dealing with problem areas on which it does not have a clearly defined policy. There are great differences of interests among present EU members – Poland has to be very careful when building coalitions because the risk of manipulation is high.

We should consider supporting the establishment of a flexible decision-making process ('passarelle method') when shifting policy areas from the unanimity procedure to QMV. This element should be key in our negotiations. We should underline that our proposal benefits the integration process.

## 5. Common Foreign and Security Policy

### Evaluation:

We should approve new rules governing the Area of Freedom, Security and Justice but be more reticent with respect to the Common Foreign and Security Policy. Several points in that policy need to be reconsidered and discussed again during the IGC (particularly those relating to the NATO role).

The Draft clearly aims at accelerating the CFSP and, especially, the CSDP due to flexibility of regulations. The proposals allow (with few exceptions) a differentiation of cooperation between Member States. Until now, most Member States were rather sceptical about such idea declaring that this delicate matter called for maintaining the 'lowest common denominator'.

The project elasticizes the whole CFSP issue by widening the implementation of the QMV procedure. In addition, it gives the European Council general authorization to decide (unanimously) the areas where the procedure would be implemented. Strengthened cooperation is possible today in all CSFP areas (the only exception being those CSDP areas where a group of states can implement action without any special restrictions). In the most important cases, namely where the alliance clause and structural cooperation are concerned, a full detachment is possible.

The idea of elasticizing the CSFP by widening the scope of QMV implementation seems quite logical, but proposals going beyond that point threaten to de-fragmentize the CFSP and seem to serve no other purpose than to write current political divergences into the Treaty. A sensible compromise would be to involve the European Council in the decision-making process (according to general requirements for strengthened cooperation).

Proposals linked to CSFP legal sources are burdened with the Draft's overall structural weaknesses. It is hard to resist the feeling that the dogma of standardized wording with respect to all the former pillars has dominated over the usefulness of the idea. That approach did nothing for the clarity of the project or for the coherence of the solutions.



One would be justified in criticizing the Convention for having failed to introduce any significant way of strengthening the democratic legitimization of CFSP decisions. It is not by increasing the number of CFSP areas which must be reported to the European Parliament that the deficit will shrink. The Convention did not propose the use of national parliaments in monitoring the CFSP process, whereas we believe that involving national parliaments would be a step in the right direction.

### Recommendations:

This part of the Draft text needs to be considered from several angles. In their present form, proposals put forward in important policy areas reflect current political controversies and do not generate conditions needed to strengthen the European identity in international relations.

The proposal of a structural cooperation clearly ensues from current political conflicts and can lead to the creation of sub-groups in the EU, as well as to the weakening of trans-Atlantic relations. It should be rejected.

The formula of 'strengthened cooperation' should be looked at from the legislative and substantive perspective.

A great deal of consideration should be given to the discussion of elasticizing CFSP activities, especially in the case of strengthened cooperation.

Poland should wholeheartedly support the idea of widening the scope of the Petersberg Tasks and establishing an Armament Agency. However, we should propose

the involvement of national parliaments in this area as a way of increasing the democratic legitimization of the process.

### 6. Procedure of action – the formula of Convention activities and the importance of the Intergovernmental Conference

#### Evaluation:

The formula of the Convention (as a stage in preparing reversionary treaties) should be promoted, mainly due to the fact that it brings the decision-making process closer to the EU citizen. The role of the Convention should be limited to developing solutions, because the role to make decisions is reserved to the Intergovernmental Conference and to it alone.

The performance of the Convention has clearly shown weak points in the Convention formula – particularly from the acceding countries perspective. Members of the Convention did not have a clear mandate and, as a result, the decision-making power was concentrated in the hands of the Convention Presidium and was not very transparent. This is why, in many cases, the final Draft does not reflect the main lines of the plenary discussion. We in Poland understood too late that the Convention was not just a 'club of talking heads' but a place where a coherent national strategy should be presented.

It is hard to resist the feeling that the very unclear decision-making process served the purpose of passing through important political decisions before the closure of the

enlargement process. The short period between the Convention and the IGC, as well as the short duration of the IGC itself, support that impression. The IGC will work under time pressures, which will not help an in-depth discussion of existing problems, particularly those affecting the interests of the acceding countries.

The main task of the IGC is to create a good draft of the Treaty establishing a Constitution for Europe, which can be ratified by all Member States, including those that will join on May 1st, 2004. We have to bear in mind that in these countries – particularly in Poland – the societal acceptance of the Treaty will play a key role in the ratification process.

### Recommendations:

The Draft Treaty is a good starting point for a discussion. Many proposals of fundamental importance need to be re-discussed, as illustrated by postulates brought forward by both the Member States and the European Commission. Poland has the right to demand a thorough discussion, unlimited in terms of the level at which it takes place and topics it covers. Working under time pressure is not in the interest of our country.

Poland should be against diminishing the role of the IGC. It is an important body with foundations in Art. 48 TEU, responsible for preparing the final formula of the Union's reform. The Convention had only a political legitimization and its role was limited to preparing the draft; postulates brought forward by Member States ought to be discussed at the Intergovernmental Conference.

The procedure of including the Convention in future revisions of the Constitutional Treaty should be whole-heartedly supported by Poland.

## 7. Ratification of the Constitutional Treaty in Poland and supportive measures of home politics

### Evaluation:

The Treaty will constitute an international agreement subject to ratification by Member States according to their national constitutions. In Poland, the basis for the ratification process will be Art. 90 of the Polish Constitution, which provides for ratification by the president, by legislation or by referendum. One has to bear in mind that each reversionary treaty will be submitted to that procedure. If a referendum is held, the voter turnout must exceed 50% for its outcome to be declared valid. In fact, the present Polish constitutional formula might block European integration owing precisely to a low voter turnout at the referendum.

The project of the Treaty has several interesting proposals which strengthen participatory democracy and widen the scope of participation by national parliaments.

### Recommendations:

Irrespective of the chosen ratification method, Poland has to reconsider the ratification process written in the Constitution and has to eliminate the need for the 50% voter turnout. This change would reflect the





procedure needed to amend the Constitution itself (Art. 235, Sec. 6, of the Polish Constitution).

An effective application of the possibilities created by the Draft depends on national possibilities. These mechanisms have not been implemented in Poland yet. The role of the Sejm (lower house of the Polish parliament), the Senate and the regions in the EU decision-making process has to be bolstered. ■

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